# Supreme Court of the United States.

OCTOBER TERM, 1898.

*No. 462.*

THE COLUMBUS CONSTRUCTION COMPANY,
*Plaintiff in Error,*
*vs.*
CRANE COMPANY,
*Defendant in Error.*

*Error to the Circuit Court of the United States for the Northern District of Illinois.*

## Argument for Plaintiff in Error Against Motion to Dismiss.

The act of Congress under which it is claimed that this court takes jurisdiction, confers such jurisdiction in a "case that in- "volves the construction and application of the Constitution of "the United States;" and also in a "case in which the constitu- "tion or law of a State is claimed to be in contravention of the "Constitution of the United States."

This case falls literally under both of these classifications. The court below construed the Federal Constitution and held the statute of the State of Indiana to be not repugnant to the provisions of that instrument. "A law of a State," namely, the statute

of Indiana in question, was in this case "claimed to be in contra-"vention of the Constitution of the United States."

That this case, therefore, comes within the letter of the statute is obvious.

It is not to be supposed that the framers of this act intended to impose any such limitations upon the jurisdiction of this court as attend upon the exercise of its revising powers upon error to the courts of the several States. As to such courts this tribunal is the final repository of judicial power only upon questions which are strictly Federal or National; and no other Federal court has, as to State courts, any appellate jurisdiction whatever. This court sits in final judgment only upon those great Federal questions, the solution of which can only, with propriety, be committed to a great National court of last resort. As to all questions of State or local law this court, upon error to a State court, is absolutely without jurisdiction. However patent and glaring an error may be committed in this regard, this court is powerless to correct it. To hold otherwise would be unduly to impair the authority and powers of the several States, and to unwarrantably interfere with their rightful autonomy. But where a Federal court exercising appellate jurisdiction, takes on error the record of an inferior Federal court, it has all the powers and jurisdiction of a court of errors at common law, and may determine all questions of law presented on the record.

This statute aims merely at the distribution of such general appellate jurisdiction between this court and the Circuit Courts of Appeals, and, unlike the legislation conferring upon this court appellate jurisdiction in respect of State courts of last resort,

it confers upon this court jurisdiction over, not a certain class of questions, but a certain class of cases. Between this court and the Circuit Courts of Appeals all appellate jurisdiction over inferior Federal tribunals is distributed; and when either of these courts takes a case it decides not merely one but all questions that are properly presented in that case. The question here is, does this case come within the description of cases assigned to the appellate jurisdiction of this court; not whether there is in this case a constitutional question necessary to its decision. This clearly appears from the decision of this court in *Holder* v. *Aultman, Miller & Co.*, 169 U. S. 81.

There this court found it unnecessary to pass upon any constitutional question, yet took the case and pronounced judgment upon the merits.

That case seems plainly to require that this motion to dismiss be denied. But it is sought to discriminate this case from that by saying that there the court below heard the case without a jury, and held the State statute in question to be inconsistent with the Federal constitution, and that such holding was the basis of the decision below. Here again is an attempt to apply the principles regulating the exercise of the jurisdiction of this court over State tribunals in the construction of the act in question. In the former class of cases it is necessary that the Federal question should have been controlling and determining in the State court.

But it is not so in cases coming to this court from Circuit Courts. In the case last cited let it be supposed that in the court below the plaintiffs in error had contended that the State statute in question was both unconstitutional and inapplicable; and

that the Circuit Court instead of holding the law unconstitutional, had held it to be, as did this court, inapplicable. It can not be doubted that in such a case this court might take jurisdiction on error, because such a case would fall within the general class of cases as to which this court exercises appellate jurisdiction. There might or might not be necessarily presented to this court any constitutional question, as in fact there was not when that case came here. In the case supposed, however, if this court disagreed with the Circuit Court and held the statute applicable, then the constitutional question must necessarily have been decided.

It was in the case, and that fact gave this court jurisdiction, wholly irrespective of the question whether it was the controlling question either in the court below or in this court.

So in this case the constitutional question was raised, discussed and decided. This case, therefore, is one coming clearly within the grant of appellate jurisdiction to this court. It is wholly immaterial now whether it was the controlling question in the case or whether the record discloses other grounds upon which the case must be regarded as rightly decided.

This is of the class of cases of which this court takes jurisdiction. To say that only cases involving a certain class of questions come to this court is far from saying that this court may only take such cases where a determination of a question of the prescribed class is necessary to a decision of the case. Under the grant of jurisdiction in respect of that class of cases this court takes the case and not the question, and may decide the case, yet leave the question which gave it character and determined its destination upon error, wholly untouched.

It is not desirable that the jurisdiction of this court in cases involving questions arising under the Federal Constitution, should be impaired by a narrow and illiberal construction of the act of 1891. That act was in a measure experimental. Various expedients had been suggested to relieve this court of the constantly increasing burden imposed by its enormous docket; and that of an intermediate Appellate Court was finally, after much discussion, adopted by Congress. But the American bar at all times opposed any legislation tending to weaken or impair the position of this tribunal in our national government. All efforts to enlarge the numbers of the justices composing the court and to divide it into sections were steadfastly and, it is thought, wisely resisted. It would be interesting and possibly instructive did time and the occasion permit, to examine somewhat the discussions, professional and otherwise, while this matter was pending.

But the plan that prevailed in Congress was adopted in preference to others suggested, largely because it was felt that it left this court in the great domain of constitutional law, with all its powers absolutely unaffected, and did not in any way tend to impair public confidence in, and respect for this great tribunal, nor by a change in its Constitution dissipate its strength and threaten its traditional influence and authority. Now the very question which counsel for defendant in error in their able and logical brief insist this court must determine on this motion, pertains to, and is a necessary part of its jurisdiction on error, in respect of cases involving constitutional questions. It is for this court, entirely unembarrassed by the interference of any other court whatever, to determine, when a constitutional question arises in a

Circuit Court, not only whether it was well decided, but how far and to what extent its decision enters into and affects the result. That was precisely the course taken in *Holder* v. *Aultman*, and this court expressly decided that there was no controlling question of constitutional law presented in the case, but that it was well decided by the court below, though upon grounds other than those stated by that court.

Learned counsel avoid saying that this court has no jurisdiction on error unless the constitutional question presented below is controlling; but that is the effect of their argument. They can not well affirm this, however, as precisely that contention was overruled by this court in *Penn Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685, 694–5. It was there said :

"The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist, not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition that 'The constitution or a law of the State of Texas conflicts with appellant's contract, and contravenes the Federal Constitution; in other words, it must affirmatively appear upon the face of complainant's bill that there was involved in this case a Federal question, *the determination of which was essential to a correct decision of the case.*' But the words of the statute, which empower this court to review directly the action of the Circuit Court, are that such power shall exist wherever it is claimed on the record that a law of a State is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the State law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does not exist

where it is claimed that a State law violates the Constitution of the United States, unless the claim be well founded. But it can not be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a State court with the power exercised by this court, under the act of 1891, to review by direct appeal the final action of the Circuit Court, where, on the face of the record, it appears that the claim was made that the statute of a State contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record. *Horner* v. *United States*, 143 U. S. 570."

That case is authority for the proposition just stated, that in cases where a constitutional question is raised below, it is for this court to determine the collateral question how far it was controlling, or affected the decision.

Here it also must be observed that it also demonstrates the authority of this court as the final arbiter of Federal constitutional law, to determine whether a constitutional right has been lost by laches, waiver or acquiescence. It would seem obvious that this question pertained to the domain of constitutional law, yet learned counsel seem to suppose that if they can satisfy this court that the plaintiff in error has waived or lost its rights to contest the invalidity of the Indiana statute they have excluded the jurisdiction of this court. (*Vide* their brief, pp. 30 *et seq.*)

If that question is here it clearly demonstrates that this case is within the jurisdiction of the court; for in the case last cited

this court held that the party there asserting its rights under the Federal Constitution had lost those rights by laches.

Therefore it was held here, as well as by the court below, that the appellant in that case was not entitled to relief, quite irrespective of whether it possessed such rights under the Constitution as were claimed upon the record. To that extent the constitutional question was immaterial and was actually undetermined, because by laches complainant had lost its right to the relief to which it might, perhaps, otherwise have maintained its claim.

So far as the report of this case shows, no constitutional question was decided either by the Circuit Court or this court. Certainly it does not appear that the decision of the court below proceeded on any such question, or that such a question, to borrow the phrase of counsel, "entered into the judgment rendered." If it was jurisdictional that this should appear, this court must have dismissed, as the record was silent upon that point. There is nothing to show that the Circuit Court did not, in effect, hold, as this court did expressly determine, that whether or not the complainant company had the rights claimed under the Constitution, need not be determined, because whatever its rights, laches barred their assertion. Nevertheless this court took jurisdiction because there was a case in which "the Constitution or law of a "State was claimed to be in contravention of the Constitution of "the United States;" yet determined the case upon general principles of equity jurisprudence, without any discussion or decision of the constitutional question existing in the case, as the only basis for the jurisdiction exercised by the court.

If there was ever a case of "error without prejudice" this would seem plainly to be one so far as the constitutional ques-

tion is concerned; and the same may be said of *Holder* v. *Aultman*. But that doctrine has no application whatever as a test of the jurisdiction of this court.

A statutory provision distributing appellate jurisdiction between this court and the Circuit Court of Appeals is, to some extent, arbitrary. The question is always whether the case under consideration falls within the general description of cases which come here, or under the description of cases that go to the Court of Appeals. The principle that error without prejudice to the complaining party will not reverse, has no application, because the question on motion to dismiss is not whether the judgment complained of shall be reversed or affirmed, but what court shall hear the errors assigned. It is not whether the error said to be harmless is so in fact, but what court shall decide whether it is well assigned.

This writ of error must be heard in this court or in the Court of Appeals. It is wholly unnecessary in determining which court shall take it, to consider whether any errors are well assigned or not. It is unnecessary to discuss whether the constitutional question was rightly or wrongly decided, or even whether it was decided at all; whether it is controlling, subsidiary, or, by the verdict of the jury, wholly eliminated. All these are questions to be passed upon by the court hearing the case on error. The fact that the question which fixes the nature of the case for the purposes of appellate jurisdiction was made below, and that it has a fair basis in law, which it certainly has, for one justice of the Supreme Court of Indiana dissented in *Jamieson* v. *Indiana, etc., Gas Co.*, 128 Ind. 555, where the law was upheld, establishes the jurisdiction of this

court. This should be so, for the court could not retain the full measure of its power in this field and fully meet the great responsibilities attendant upon the possession of this power unless, where these constitutional questions are raised, there be reserved to this court jurisdiction to decide not only these questions but all collateral questions involved. To secure this, the statute, unlike the judiciary act, in so far as it relates to error to State courts, gives to this court jurisdiction to hear all cases, including all questions of every description arising in any case where the jurisdictional question is presented. This statute should not, by the narrow and technical view ingeniously pressed by counsel for defendant in error, be unduly restricted, and the obvious purpose of legislation on this subject defeated.

The cases cited by counsel do not sustain their position. *In re Lennon*, 150 U. S. 393, was a case in which the jurisdiction of this court was asserted upon the ground that the jurisdiction of the court below was in controversy. The views here maintained are quite consistent with the language quoted from the opinion. In *Carey* v. *Ry. Co.*, 150 U. S. 170–181, after the language quoted by counsel the opinion proceeds thus:

"The bill before us refers to no provision of the Constitution upon which complainants relied to invoke the action of the court in vindication of their supposed rights, or which was presented to be construed or applied by the court. *No question upon such construction or application was raised between the parties upon the record or determined by the decree of the Circuit Court.*"

Counsel quotes from *Railroad* v. *Louisville*, 166 U. S. 709–715, as follows:

"It is essential to the maintenance of jurisdiction, upon the ground of erroneous decision as to the validity of a State statute

or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the Constitution, and that the decision sustained its validity, or that the right was specially set up or claimed and denied."

As to this case it is only necessary to say that it was brought to this court by writ of error to the Court of Appeals of the State of Kentucky. The language quoted is merely the classical formulary by which the jurisdiction of this court, in respect of cases decided by the courts of last resort in the several States, has for many years been tested. It has no possible application here; that it should be quoted in this connection indicates a remarkable lapse on the part of the able and generally very accurate counsel for defendant. It seems to cast some suspicion upon the statement in their brief with which this language is immediately followed—that they are not unmindful of the difference between the jurisdiction of this court to review the decisions of State courts and that conferred by the Court of Appeals or judiciary act of 1891. With deference it is thought that they have failed to grasp the essential and fundamental distinction in this regard and are justly chargeable with an effort to limit and narrow the plenary jurisdiction of this court in respect of the general class of cases coming here under that act, in disregard not merely of its letter but of its spirit and important purpose.

Of course the constitutional question, like all other questions of law, was decided by the court and not by the jury. It is not believed to be at all material how far its decision affected the verdict. But as counsel has dwelt upon this it may not be out of place to explain the ruling of the court below in the light of the opinion of the Court of Appeals on a former writ of error, to show

that by that court the Indiana statute was regarded as material, and how; and then to say a word as to the probable effect on the jury of telling them that a party who had been spending hundreds of thousands of dollars to make this pipe line tight at a pressure of 600 pounds or upwards, had no right to do this under the law of Indiana nor to recover for any expenditures beyond what was necessary to bring the line up to 300 pounds, the standard of pressure limited by the Indiana statute, including a reasonable factor of safety.

II.

In entering upon this branch of the discussion, it may be premised that the writer of this brief fully agrees with the suggestion that there should in fact have been no such question of constitutional law in this case, and that neither the modification of the contract between the Gas Company and the Construction Company, nor the Indiana statute as to the transmission of gas in pipe lines, has any relevancy whatever to the questions presented in this case. The efforts of counsel for the plaintiff in error have heretofore been always directed to the establishment of these propositions; but it is too late now for the counsel for the defendant in error to take this position; they have sedulously contended that both this modified contract and the statute of Indiana were important elements in this case. This appears from the report of the case, *Crane Company* v. *Columbus Construction Company*, 73 Fed. Rep. 984, 990, where the claims of the Crane Company in this regard, and theirrequest to charge, are stated by the court. Nor is it true, as contended by counsel, either that the Court of Appeals or the Circuit Court apparently regarded the modified

contract alone as sufficient to restrict the right of the plaintiffs in respect to recovery of damages, as that right was in fact limited by the charge of the court. The right of a purchaser of a defective article to recover such moneys as he has expended in so far as such expenditure is reasonable, in the effort to make the articles as good as they would have been if up to the contract of sale, has been recognized by this court. *Marsh* v. *McPherson*, 105 U. S. 709. Referring to the effect of the modified contract, therefore, counsel for the Construction Company in the Court of Appeals contended that the question as to what use the purchaser intended to make and did actually make of the goods purchased, could not be considered for the purpose of relieving the seller from the obligation of his contract in this regard; that is to say, that if a purchaser intended to sell the article for less than he gave for it, or even to give it away, he would not be disabled from recovering such damages as he would otherwise be entitled to claim, by reason of any failure of the thing purchased to answer the terms of the contract of sale. It was contended that a seller could not exact the full contract price of an article which he had agreed should be of a certain kind and quality, upon the ground that the purchaser had really suffered no loss, because in view of the disposition which he had made of the article bought, he had in fact sustained no damages, but was just as well off as he would have been had the article in question fully met the requirements of the contract of sale. And on that point there were cited, 2 Sutherland on Damages, 374; *Muller* v. *Eno*, 14 N. Y. 597, 604–5–6, also 609 and 10; *Fisk* v. *Tank*, 12 Wisconsin, 276. These citations seem to sustain the position taken by the Construction Company. But the Court of Appeals held, apparently, that

however this might be generally, the Indiana statute limiting the use which the Gas Company could make of the pipe in question rendered it, in connection with the modified contract, unreasonable for the Construction Company to make repairs to this pipe line to give it a degree of strength and efficiency which the Construction Company was not, by its contract with the Gas Company, required to provide, and which would be of no utility to the Gas Company, because under the Indiana statute that company could not be permitted to operate the line at a pressure which would require any such strength and efficiency in the line in order safely to convey gas. On that point the court, page 991, employed this language: "But if, as the proposed instruction assumes, the pipe met the requirements of the modified contract with the Indiana Company, *and by reason of the Indiana statute, a pipe capable of bearing a pressure of more than 300 pounds was not needed*, then manifestly, it was unreasonable to expend time or money in an effort to impart to the pipe a degree of strength which could be of no practical utility. * * * The instruction asked was hypothetical, leaving to the jury the determination whether the facts were as supposed, and whether the expenditures in question were reasonable, and if the modified contract with the Indiana Company had been admitted in evidence, the instruction would have been pertinent and proper to be given. The statute of Indiana, and the decision of the Supreme Court of that State whereby it was declared constitutional, were matters of judicial cognizance, in respect to which formal proof was unnecessary." The court below strictly followed the opinion of the Court of Appeals in these rulings on this question. It is quite obvious that the statute was regarded by both courts as a material

element in the case, and as limiting the rights which the Construction Company would otherwise have had under its contract with the Crane Company. It is true that both courts seem to have held the Construction Company was entitled to pipe such as the contract called for, but both denied the right of the Construction Company to expend money in making the pipe up to the contract by reason of the modification of its contract with the Gas Company, and on account of the provisions of the Indiana statute. Now although this was a ruling only upon the question of damages, it is quite apparent that the necessary tendency of this ruling would be to fix an imputation of bad faith upon the attitude and conduct of the Construction Company, and thus to discredit its entire claim, and prejudice the jury against it. If that company wantonly and without any warrant of law had expended thousands of dollars for the purpose of bringing this pipe, as laid in line, up to the efficiency guaranteed in its contract with the Crane Company, the jury would naturally look with suspicion upon the entire case of the Construction Company. The very fact that on the second trial the Construction Company recovered a verdict when this matter was not thus put to the jury, and that on the last trial, when this contract was admitted and these instructions were given as to the Indiana statute, the Crane Company recovered a verdict, the difference to the parties between the results of the two trials, being nearly $150,000, illustrates what must be obvious to those familiar with jury trials, that this matter had great, even controlling weight in the determination of the case. The modification of the contract with the Gas Company was not made until over a year after the contract between the parties to this record was entered into,

and could by no possibility, therefore, have been regarded as within the contemplation of the parties. It was absolutely *res inter alios*, and either alone or taken in connection with the Indiana statute, had no legitimate bearing on the issues presented on the trial of this case. The effect given to the Indiana statute and this modified contract, not only limited the right of the Construction Company to recover damages, but discredited its entire case, and had a fatal effect upon its claims in respect to the character and quality of the pipe delivered. It is not conceded that these considerations are at all material in determining whether or not this court may properly take jurisdiction of this writ of error; but these suggestions have been offered to meet the argument of counsel that the only possible effect which these rulings could have had upon the Construction Company's case was to limit its recovery in respect to damages, and that as the jury had found that the company was not entitled to any damages, these rulings were to be regarded as error without prejudice. By this application of the Indiana statute, the contract rights of the parties under a contract entered into nearly a year prior to the adoption of the statute are sought to be limited and impaired. It is true the statute has no apparent relation whatever to the contract in suit, and as counsel for the plaintiff in error feel, ought not to have been in any way applied to it; but both the Court of Appeals and the Circuit Court, following the mandate of that court, have so applied this statute, and given it such construction, and it follows that upon error assigned against these rulings, this court has jurisdiction.

As the Construction Company took in payment for its work, stock and bonds of the Gas Company, it is quite apparent that

it had an obvious interest in giving the Gas Company as good a line as possible. (Trans. 354.) Why these companies modified their contract after the adoption of the statute the record does not disclose. Possibly it was a feeble effort to mitigate the general popular indignation, which may have been supposed to have been aroused throughout the State of Indiana at this effort to pipe natural gas to Chicago. But however that may be, in view of the method of payment to the Construction Company, that company was interested, in spite of this change in the contract, in holding the Crane Company to its agreement and furnishing the Gas Company with a line tight at 1,000 pounds pressure.

But the court told the jury that plaintiff had no right to do this because of the modification of its contract, and because of the Indiana statute. What the plaintiff did was therefore beyond its legal right under its contract with defendant, as the jury were advised. Under such a charge the whole case of plaintiff was discredited and the result is not to be wondered at.

Counsel seek to give the impression that the line was incapable of holding gas at a pressure of 100 pounds. (Page 20.) It did leak at this pressure, at first, as is not infrequently the case; but by iron caulking and other expedients, it was, to some extent, made reasonably tight at a much higher pressure, up to nearly 400 pounds. (Trans. 154.)

Indeed, there was fair basis for argument, though such was not in accordance with the weight of evidence, that the line was sufficient to stand the statutory pressure of 300 pounds. Now, this court will notice in the quotations from the charge found in defendant's brief commencing at page 21, that the court below did

not say that defendant must fully perform its contract. At page 21 is the following, the italics being those of counsel:

"By this contract the Crane Company, defendant, did not become obligated, did not promise or assume to furnish the defendant a tight line under the high pressure named in the contract, as it had no part, and took upon itself no obligation as to the duties of handling, caring for, screwing into line and laying the pipe after it had left the hands and care of the defendant. But it did assume and agree *to furnish pipe and collars* of material, strength, weight and threading *which would substantially conform to the specifications of the contract.*"

On the next page is the following:

"The provisions of the contract as to pipe proving tight in line must receive a reasonable construction, both with reference to the state of the art of pipe-making and of the piping of gas as known and existing at the date of the contract, and with regard to the *conditions which must be met by this line*, owing to its length, *the high pressure required*, and the need of economy and safety in conducting the gas to delivery points. There is evidence tending to show that no gas line had been made which was absolutely tight in line at even less pressure than this contract called for. The term 'tight in line,' as employed in this contract must be interpreted as reasonably tight in line."

This was immediately followed in the charge of the court by this language, not quoted by counsel:

"Considering the objects and conditions of the undertaking and the possibilities of the art and business as then existing and understood according to the evidence."

Counsel give thus an incomplete sentence. (See 7th assignment of errors, Trans. 505.)

In many other places in the charge there is language indicating that substantial and reasonable compliance with the contract is sufficient. (See 19th and 20th assignments, Trans. 510.)

Substantial performance is not sufficient. *Norrington* v. *Wright*, 115 U. S. 188–209, and cases cited; *Keeler* v. *Herr*, 157 Ill. 57, and cases cited. There are many other authorities to the same effect, but that is not the particular point now material. If the court will read the charge of the court at the points to which reference has just been made, and then in the same connection read the instructions as to the measure of plaintiff's recovery in view of the modified contract and the Indiana statute (13th and 14th assignments, Trans. 507–8), the court will perceive that it would be difficult for the jury, as indeed it is for any one, to discriminate between the assertion of the plaintiff's right to have pipe substantially up to the contract and capable of making a line reasonably tight, and the statement that plaintiff could recover only such expenditures as were reasonably necessary to make the line tight at the statutory pressure of 300 pounds. In other words, under these instructions it is most probable that the jury would suppose the defendant was entitled to the contract price, if the pipe was good enough to make a line tight at the statutory pressure of 300 pounds, and that this was reasonably tight under all the circumstances, and in substantial conformity with the contract between the parties. This would be the natural effect and construction to be given to the charge as a whole. Reference is made in the charge to the degree of care required of defendant to procure good pipe. (5th and 6th assignments, Trans. 504, 505.) This is wholly immaterial. A party can not exonerate himself from his contract by showing that he tried to perform it, and still hold the other party to full performance. The whole case was so put to the jury by the court as to give color to the idea that the rights of the

parties were in effect to be controlled upon considerations of reasonableness and really not by their contract, but by the contract between the Construction Company and the Gas Company, and the Indiana statute.

Time does not admit of any discussion of the curious distinction made by the Court of Appeals between the barren right of the Construction Company to recover as damages the full difference between the market value of this 106 miles of pipe as it was scattered along the right of way through the swamps, under rivers and along the farms of Indiana, and what it would have been worth if up to contract; and the limitation imposed by virtue of the Indiana statute upon its right to recover expenditures necessarily made in the effort to repair the pipe and bring it up to contract. The court held that neither the modified contract nor the Indiana statute impaired this abstract theoretical right in any way. Of course this pipe so situated had no market value in any ordinary sense. The only thing the construction company could do was to repair it. But its right to recover as to such expenditures was held absolutely limited by the modified contract and the statute.

Such repairs were necessarily made in the field, as the freight alone, to get the pipe to the mills and back, to say nothing of other expenses in handling it, would have been such a large sum —$24,448.89 one way (Trans. 257–249)—as to make mill repairs far more expensive. (Trans. 194, opinion of Hequembourg.) Therefore the Construction Company did the only thing it could do. The question of its right to recover in respect of its expenditures in view of its modified contract and under the Indiana statute, is so closely interwoven with the merits of the case on

the issue of its right to recover at all that as the case went to the jury if there was error in this regard it was highly injurious.

Much more might be said in this line, but it is hoped enough has been said to satisfy the court that this case should be retained, even if it is material to determine on this motion whether or not error is well assigned on a constitutional question, or is without prejudice. It is thought, however, as already indicated, that this question is not here presented. The nature of the question presented establishes the jurisdiction of this court quite irrespective of what conclusion the court may ultimately reach as to how that question should be determined.

Respectfully submitted,

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